

SUBMISSION OF INTERNET ARCHIVE CANADA IN RESPONSE TO THE CONSULTATION ON A MODERN COPYRIGHT FRAMEWORK FOR ONLINE INTERMEDIARIES

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Submitted by:

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Internet Archive Canada is a not-for-profit digital library whose mission is to provide universal access to all knowledge. To date, Internet Archive Canada has digitized more than 650,000 books, maps, micro-reproductions, and other archival materials, including a substantial collection of materials focused on Canadian cultural heritage and historical government publications.¹ More than 300 libraries and memory institutions from across Canada have supported Internet Archive Canada, including: McGill University, University of Alberta, Royal Ontario Museum, Canadian Museum of Human Rights, and University of Victoria. Foundational partners included University of Toronto, University of Ottawa, Canadian Research Knowledge Network, and Library and Archives Canada/ Bibliothèque et Archives Canada. Internet Archive Canada's efforts represent a significant investment in and contribution to the accessibility of Canadian digital heritage.

Internet Archive Canada works with the Internet Archive, a California-based public charity, to make materials accessible to the general public in Canada and throughout the world. Internet Archive is building a digital library of Internet sites and other cultural artifacts in digital form.² Like a paper library, Internet Archive provides free access to researchers, historians, scholars, the print disabled, and the general public. Internet Archive Canada continues to seek opportunities and partnerships to expand access to knowledge,³ and is a founding member of the National Heritage Digitization Strategy.⁴

The work of a library like ours often involves the upload and delivery of various kinds of materials online, including in collaboration with other library partners as well as citizen archivists. Internet Archive Canada and these various participants are therefore very likely to be impacted by any modification of the copyright framework for online intermediaries in Canada. We believe a significant modification to the existing framework would threaten the future of libraries in the digital age. In the circumstances, Internet Archive Canada urges the Government of Canada to make no significant changes to Canada's basic framework for intermediary liability today.

¹ <https://archive.org/details/toronto>

² <https://archive.org/>

³ <https://ocul.on.ca/accessible-content-eportal-reaches-15000-titles>

⁴ <https://nhds.ca/>

Introduction

Circumstances have no doubt changed since the first establishment of online copyright frameworks. As noted in the Consultation, this includes changed economic circumstances relating to “web giants” (e.g. in Section 1) and their “bargaining power” (e.g. in Annex A). We too see that many of yesterday’s innovative technology startups are today’s web giants.

But we believe it would be a mistake to establish new copyright rules for the digital world with too narrow a focus on the bargaining power of web giants. To be sure, such issues concern economic relations between some of the largest companies in the world, and the doings of these companies are significant. But a change in copyright law will not impact only them, it will impact *everyone*: including smaller nonprofits and libraries like us, our library patrons, Canadian authors and creators, and ordinary internet users of all kinds. In view of the broad impact of copyright law, we believe that it is important that copyright not be used with an eye towards achieving more narrow competition policy ends.

We also do not see that new copyright rules could rein in the “web giants,” even if that is a goal; it will only entrench their position. It is the giants who can afford to shoulder the burdens of intrusive new copyright laws; small and non-profit alternatives risk collapse. This fact has been recognized, though perhaps not well addressed, in copyright reform debates in other jurisdictions, which have in some cases sought to exclude non-profit and public-interest-minded intermediaries from burdensome new rules.⁵ While crafting exceptions is one approach, we prefer an approach to copyright law that preserves a free and open internet that works for everyone and allows for new approaches. That is why, as set out below, we urge the Government (1) to make no significant changes to its intermediary liability framework, (2) to preserve the current safe harbor, and (3) to reject the chimera of neutrality.

1. Make No Significant Changes to Canada’s Intermediary Laws

We appreciate that, as set out in Section 4 of the Consultation, “[s]ignificant changes to Canada’s basic model of intermediary liability” are “not presently being contemplated.” At the same time, many of the items identified for discussion in the Consultation would—if adopted—appear to represent extraordinary changes to the copyright model that governs intermediaries in Canada today. In the circumstances, we hope that Government has no present intent of adopting these new rules. And we urge the Government to maintain Canada’s basic intermediary liability rules in their current form: most importantly, a safe harbor protection for intermediaries who comply with the current notice-based regime. At a minimum, we believe that further study would be necessary and would reveal the wide-ranging impacts and significance of the changes under consideration to libraries, their patrons, other end users, and the information infrastructure of Canada as a whole.

⁵ See, for example, Paragraph 62 of the Recitation in Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market.

2. Preserve the Current Safe Harbor

That said, we believe it is clear today that any change to the current safe harbor would represent a significant—indeed, a tremendous—change. That is in part because moving to a notice and staydown regime, altering the knowledge standards applicable to intermediaries, or even adopting smaller tweaks, would create a situation where the largest rightsholders would no doubt insist that intermediaries must adopt automated filtering technologies in order to comply with the law. If successful, this kind of change would impose costs on intermediaries which could well make operations difficult or impossible for all but the largest corporate behemoths; e.g., the tech giants of the United States and China. We worry that non-profit Canadian libraries like us, and other smaller or more focused institutions, will have no place in such a digital ecosystem—to say nothing of the impact on ordinary Canadian users and creators. Put another way, this kind of reform will create and reinforce an information ecosystem controlled almost entirely by the largest platforms outside of Canada, who—in addition to employing content filtering—would be free to censor or otherwise remove or prioritize materials according to their own interests. Needless to say, these interests may well diverge significantly from the interests of Canadians. And there is no “neutrality”-based contingency which could remedy this harm.

3. Reject “Neutrality”-based Rules

While we understand why neutrality-based rules for platforms have some intuitive appeal, we believe that attempts to make safe-harbor protection contingent on acting “in a neutral manner” will ultimately prove unworkable and inconsistent with fundamental copyright law. To see why, one need look no further than the existing platforms which espouse so-called “neutrality”: they quickly become havens for the worst kinds of harmful and illegal materials. For the rest, no doubt to avoid this outcome, there are always “rules of the road.” Could these rules coexist with a “neutral manner” obligation? How would they handle intermediaries which already remove content that is violative of rules or laws in what may be considered a non-neutral matter; e.g., by removing violative but supposedly political content (e.g. Nazi propaganda)? It is also not clear to us that a rule of neutrality could be practicable within the context of copyright law specifically, which focuses its analysis at the level of expression and has historically avoided sitting in judgment of ideas.⁶ In sum, while we can understand why neutrality rules are sometimes proposed, we urge the rejection such rules here.

4. Conclusion

Internet Archive Canada very much appreciates these efforts to engage in an open and thoughtful process as potential changes to copyright are considered. With respect to intermediary liability, we urge that no significant changes be made to the existing legal framework. We would however be pleased to continue to participate in this process and look forward to further engagement.

⁶ See, e.g., *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339.